



REPUBLIC OF KENYA



KENYA LAW
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**Wanyoike v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 21960 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E037 OF 2022
HI ONG'UDI, J
SEPTEMBER 1, 2023**

BETWEEN

PETER NJUGUNA WANYOIKE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment in Engineer SPM's Court Criminal case
No. E062 OF 2021 delivered on 28th March 2022 by Hon. H.O Barasa (SPM))*

JUDGMENT

1. Peter Njuguna Wanyoike hereinafter referred to as the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The particulars being that, on the 16th day of September 2021, in Kaimbaga sub-location within Nyandarua County, the appellant caused his penis to penetrate the vagina of JNN a child aged 17 years. Alternatively he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars being that on the 16th day of September 2021 in Kaimbaga sub-location within Nyandarua County the accused intentionally touched the vagina of JNN a child aged 17 years with his penis.
2. The appellant pleaded not guilty and the matter proceeded to full hearing with the prosecution calling a total of five (5) witnesses. The appellant gave a sworn statement of defence. Thereafter the trial court found him guilty and convicted him on the principal count and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the judgment he filed this appeal citing the following grounds;
 - i. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were NOT conclusively proved.



- ii. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to appreciate that there was no proper medical evidence linking the appellant to the commission of the offence.
 - iii. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.
 - iv. That, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof
 - v. That, further grounds shall be adduced at the hearing of this appeal.
4. The respondent filed the following grounds of opposition dated February 10, 2023.
- i. That, all the ingredients of defilement were proved that is age, identification, and penetration was sufficiently proved beyond reasonable doubt.
 - ii. That, the medical evidence (records) was proper and corroborated the prosecution witnesses including the P3 and the PRC form.
 - iii. That, the appellant defence was fully considered by the trial magistrate and dismissed.
 - iv. That, the petition is misconceived and lacks merit and ought to be dismissed forthwith and the conviction and sentence be upheld
5. A summary of the prosecution case is that PW1, who was born on January 11, 2004 (Pexb 1) was in her mother's house on September 16, 2021 when the appellant appeared there. He was a person known to her. Upon his arrival at the door he told her that he wanted to marry her. She declined. He then forcefully entered the house, pushed her onto the chair, and removed her blue pant. He unzipped his trouser and lay on her and raped her. She screamed and he covered her mouth. When he was done he put on his trouser and left the house. She too wore her panty and left the house. She found him on the road and they walked together upto a certain point. He gave her his phone for charging before they parted ways.
6. She went to where her mother (PW2) was and reported the incident to her. They left together to the Elder's place and he advised them to go to hospital. She was treated at J.M. Hospital and the matter was reported to Ol Kalou police station, where she was issued with a P3 form (Pexb 2) and PRC form (Pexb 3). The village Elder arrested the appellant.
7. PW2 confirmed the report from PW1 and what she did thereafter. The village Elder (PW3) received the phone and took it for charging as per the instructions as PW1 and PW2 went to hospital. The owner of the shop where the phone was taken for charging confirmed that she knew the owner of the phone. She was instructed not to release the phone without informing PW3. At around 8.00pm the appellant went for the phone and PW3 mobilized nyumba kumi officials and they went to the shop together and arrested the appellant before the phone was released to him.
8. Dr. Catherine Kibunja (PW4) produced the P3 form (Exb 1) on behalf of Dr. Mbogo as the appellant had no objection. The P3 form confirmed that PW1 had inflammation of the labia minora as well as the vaginal opening and the hymen was partially broken. This witness (PW4) filled the PRC form (Pexb 3) and the lab diagnostic form (Pexb 4). The conclusion was that there was defilement. PW5 PC Kaltumo Abdulahi No. 253102 did his investigations and had the appellant charged. He produced the appellant's phone (Pexb 2) and the birth certificate (Pexb 1).



9. In his sworn evidence the appellant stated that on September 15, 2021 he went to a certain hotel for tea and his phone unknowingly fell. Later he came to know who had picked it and he went to collect it from the lady who told her to wait for her husband who had it. As they waited the nyumba kumi Elder came and started beating him demanding to know where he had been. After being beaten he was arrested and released. He next went to the station to report about his missing phone and that's when he was arrested.
10. The appeal was canvassed by way of written submissions. The appellant's undated and reworked submissions were filed on April 25, 2023. In them he indicates that he is only submitting on sentence. In form of mitigation he urged the court to consider the circumstances of his case and give an appropriate sentence. He relied on the Court of Appeal case of *Thomas Mwambu Wenyi v Republic* (2017) eKLR and the Judiciary Sentencing Policy Guidelines. He contends that from PW1's evidence the act complained of was consented to.
11. He also referred to the Court of Appeal case of *Eliud Waweru Wambui v Republic* (2019) eKLR where the complainant was 17 years of age at the time of the alleged defilement. He submitted that the Court of Appeal held that on issues of "Maturing girls" courts take caution on sentencing since such girls enter into relationships fully aware of what they want thus a lesser sentence was called for. He urged the court to consider the period he had been in prison i.e. September 30, 2021 to April 28, 2022. Reference was made to the case of *Ahamad Abolfathi Mohammed & another v Republic* (2018) eKLR & *Geoffrey Mukai v Republic* (2017) eKLR.
12. The respondent's submissions by Mr. Atika Dennis prosecution counsel are dated February 10, 2023. They were filed before the appellant's reworked submissions filed on April 26, 2023. Counsel submitted that all the required ingredients for defilement were established i.e. age, penetration and identification. He thus urged the court to dismiss the appeal and confirm the conviction and sentence.

Analysis and determination

13. I have carefully considered the lower court record, grounds of appeal, parties' submissions, cited cases and the law. The issues that fall for determination are:
 - i. Whether the offence of defilement was proved
 - ii. Whether the sentence of 12 years should be interfered with.
14. This is a first appeal and this court has a duty to re-examine and consider the evidence afresh and arrive at its own conclusion. This was the holding by the Court of Appeal in the case of *Patrick and another v Republic* (2005) 2 KLR 162 where it was stated
 - (3) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.
15. My understanding of the appellant's submissions is that he is no longer pursuing the appeal against conviction. Despite that this court must reconsider the evidence and satisfy itself of its soundness. Having re-evaluated the evidence I find that the age of the victim (PW1) was established both by the oral evidence and the production of the birth certificate (Pexb 1) showing that she was born on January 11, 2004. She was 17 years plus 8 months plus 5 days, at the time of the alleged incident.



16. Secondly there was proof of penetration through the evidence of PW1 and supported by the medical evidence of the doctor (PW4). She confirmed that PW1's labia minora was inflamed as well as the vaginal opening and the hymen was partially broken. The finding was that the injuries were consistent with defilement. Thirdly, PW1 knew the perpetrator as a neighbour and customer who used to come to their hotel. She gave out his name to the mother (PW2). Despite the few contradictions in the evidence of PW5 (the investigating officer) I am satisfied that he was known to PW1.
17. Upon consideration of all this evidence I am satisfied that indeed the victim herein was defiled and the appellant has been well identified as the culprit. To crown it all the appellant has abandoned his appeal against conviction and wishes to concentrate on the sentence only. The conviction is hereby upheld.
18. Section 8(4) of the Sexual Offences Act provides as follows
- “ A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”
19. I am aware of some courts which have held that the setting of minimum sentences under the Sexual Offences Act is unconstitutional as it takes away the court's discretion in sentencing. I wholly agree with them on that finding but as long as the law remains unchanged the courts have to abide by it.
20. In the present case I have considered the evidence herein and the circumstances under which this offence occurred.
- As already indicated above PW1 was aged 17 years plus 8 months plus 5 days as at September 16, 2021 when the offence occurred. She had only 3 months plus 23 days to clock 18 years. The way she related with the appellant left a lot of unanswered questions. Though she claims to have been defiled against her will she joined the appellant after the incident as they walked together wherever they were going. What were they talking about if indeed PW1 was hurt by the appellant's conduct? Would the appellant have mistaken PW1 to be 18 years and above? He approached her with a request for marriage. He even gave her his phone to take for charging. Why did she take the phone? I find that there is more to this than PW1 told the court. It is true that the appellant had sex with her but he was most likely mistaken about her age considering the way she was conducting herself.
21. This is not far from what the Court of Appeal found of such girls in the case of Eliud Waweru v Republic (*supra*). The appellant and PW1 know themselves what was happening between them. When this is pieced together with what PW1 told the investigating officer (PW5) about the incident a lot of question marks are raised. She told PW5 that when the appellant came to the house she was not wearing a pant as she had come from the bathroom. So at that point was this pant removed by the appellant?
22. After considering all the circumstances of this case I find it just to set the appellant free. I hereby set aside the sentence of fifteen (15) years and substitute it with an order of the sentence already served.
- The upshot is that the appeal partially succeeds and the following orders:-
- i. The conviction is upheld.
 - ii. The sentence of fifteen (15) years imprisonment is set aside and substituted with an order of the sentence already served.
 - iii. The appellant to be released forthwith unless otherwise held lawfully under a separate warrant.
23. Order accordingly.



**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF SEPTEMBER 2023 IN
OPEN COURT AT NAIVASHA.**

HEDWIG ONG'UDI

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant

